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IN THE

Supreme Court of the United States.

In the Matter

of

MORRIS STRAUSS.

No. 186.

BRIEF FOR APPELLANT.

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Supreme Court

OF THE UNITED STATES.

In the Matter of MORRIS STRAUSS.	On Habeas Corpus.

Brief for Morris Strauss, Appellant.

This cause is here on a certificate from the United States Circuit Court of Appeals for the Second Circuit of certain questions of constitutional law concerning rendition of alleged fugitives from justice.

The cause arose on habeas corpus, issued out of the United States District Court for the Southern District of New York, to review appellant's detention under a warrant for his rendition to Ohio, issued by the Governor of New York. Appellant was proceeded against by affidavit before a justice of the peace of Youngstown Township, Ohio, for the crime of obtaining $400.00 worth of jewelry at that place by alleged false pretences. Under the

Ohio law, this charge is a felony, triable only on indictment before a jury, and the justice of the peace in question has jurisdiction to hold such defendant only for trial before another tribunal, to answer any indictment that may be found. Defendant was arrested in New York on August 22d, 1902, on a warrant issued by the Governor of New York, based on this charge. The writ of habeas corpus was discharged by the United States District Court, Judge ADAMS sitting, and on appeal this holding was affirmed by the Circuit Court of Appeals (Matter of Strauss, 126 Fed. Rep., 327). In both courts defendant-appellant raised various questions of statutory construction, considered by the Circuit Court of Appeals in the opinion cited, as also the constitutional questions certified to this Court, which the Circuit Court of Appeals correctly deemed it had no power to decide under the Act of March 3, 1901, and hence has certified to this court.

The two questions certified, put in different forms by the Circuit Court of Appeals, really involve only one question, appellant's contention that the federal constitution (Article IV, Section 2, Sul d. 2), authorizes no interstate rendition of persons proceeded against for an indictable offence before a mere committing magistrate, having authority only to hold defendant for the Grand Jury. Incidentally, the further claim is made that, if Section 5278 be sufficient statutory authority to the contrary, it is in violation of that provision of the constitution, the Circuit Court of Appeals having so construed it (Matter of Strauss, 126 Fed. Rep., 327), appellant contending, however, that it must be read distributively and does not authorize removal for

indictable offences on mere affidavit before a committing magistrate.

Article IV, Section 2, Subd. 2 of the Constitution on reads:

> "A person *charged* in any state with treason, felony or other crime who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having *jurisdiction of the crime.*"

Revised Statutes 5278 reads:

> "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an *indictment found or an affidavit made* before a magistrate of any state or territory, *charging* the person demanded with having committed treason, felony or other crime, certified as authentic by the Governor or Chief Magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive and to cause the fugitive to be delivered to such agent when he shall appear."

The offence charged against defendant is embraced by the Ohio Revised Statutes, Section 7076 (Bates' Annotated 4th Ed.), which reads as follows:

Section 7076:

> "Whoever, by any false pretense, with in-
> "tent to defraud, obtains from any person any-
> "thing of value * * * shall, if the value of
> "the property or instrument so procured and
> "sold, bartered or disposed of or offered to be
> "sold, bartered or disposed of, *is $35 or*
> "*more, be imprisoned in the penitentiary, not*
> "*more than three years, nor less than one*
> "*year;* or, if the value is less than that sum,
> "be fined not more than $100, nor less than
> "$10, or imprisoned not more than sixty days
> "nor less than ten days, or both."

Under the Ohio statutes the defendant is proceeded against for a felony (Rev. St. Ohio, 6795), as the prosecuting officer certifies in the papers included in the record below (fol. 118), more than $35.00 being charged as the value, and in fact, under the Ohio statutes regarding interstate rendition (Rev. Statutes Ohio, Section 95), demand of alleged fugitives from justice from Ohio is authorized only for felony.

The Ohio statute cited (Sec. 6795) defines felony as being "all offenses which may be punished by death or imprisonment in the penitentiary," a definition in line with the decisions of this court (*Ex p.* Wilson, 114 U. S., 417; Mackin vs U. S., 117 U. S., 348), and of course a justice of the peace cannot impanel a jury, and accord the jury trial preserved by Article I, Sec. 8 of the Bill of Rights of the Ohio Constitution, reading:

> "The right of trial by jury shall be inviolate" (Bates' Anno. Rev. St. of Ohio, Ed. of 1904, page 3665).

In fact, a specific Ohio statute recognizes the requirement of an indictment for false pretences,

Sec. 7315 (Bates' Anno. Rev. St., 4th Ed., p. 3647), reading:

> "When an indictment charges an offense against property by larceny, embezzlement, or obtaining by false pretense, the jury, on conviction, shall ascertain and declare in the verdict the value of the property stolen, embezzled, or falsely obtained."

A justice of the peace of Ohio has no right to try for felony, his powers being defined by Sections 7131 and 7106 constituting him a "magistrate" whose powers are declared by Rev. St., Sec. 7147, reading:

> "*Proceedings when there is no plea of guilty.* When the accused is brought before the magistrate and there is no plea of guilty, he shall as soon as may be, in the presence of the accused, inquire into the *complaint*; and if it appear that an offense has been committed, and that there is probable cause to believe the prisoner guilty, he shall order him to enter into a recognizance, with good and sufficient surety, in such an amount as he may deem reasonable, for his appearance at the proper time, before the proper court; otherwise he shall discharge him from custody; but if the offense charged is a misdemeanor, and the accused, in a writing subscribed by him, and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment."

The Ohio statutes use the terms "affidavit" and "complaint" interchangeably, Rev. St., Section 7133, providing:

> "When an *affidavit* charging any person with the commission of an offense is filed with such magistrate he shall, if he has

reasonable ground to believe that the offense charged has been committed, issue a warrant for the arrest of the accused."

Sec. 7016 reads:

"When *complaint* is made in writing, upon oath, before a justice of the peace," etc.

It is of course settled both by the Ohio and the federal authorities, that the offense here set forth in the complaint is a felony, and an infamous offence triable on indictment only by jury, and cannot be tried before the justices of the peace before whom it was taken.

Fletcher vs. State, 7 Ohio Circ. D , 316.
Ward vs. State, 5 Ohio Nisi Prius, 81.
Inwood vs. State, 42 Ohio St., 186.
State *ex rel.* vs. Hamilton, 3 Ohio C. C., 10.
See also *Ex p.* Wilson, 114 U. S., 417.
Mackin vs. U. S., 117 U. S., 348.
In re Dana, 7 Benedict, 1.

Under the every day practice in Ohio, justices of the peace act only as committing magistrates in felony cases (Hedges vs. State, 18 Ohio State, 420; State vs. Ritty, 23 Ohio St., 562).

The question whether rendition for felony, triable on indictment only by the laws of the demanding state, is authorized before indictment, is of course an entirely different question than the undisputed right of a State Legislature to abolish indictment entirely.

Hurtado vs. California, 110 U. S., 516.

The right to remove fugitives from justice for crimes not triable by indictment, especially in jurisdictions where indictment is abolished, is not

controverted, though difficult to be sustained under an over-literal construction of the statute, R. S. 5278 (*Ex p.* Hart, 63 F. R., 259, CCA), but Ohio is not one of the states that has abolished indictment, and under Ohio law this defendant can be tried only on indictment.

The duty of the federal courts to take judicial notice of the laws of the different states is of course established (Gormeley vs. Bunyan, 138 U. S., 623, 635; Roberts vs. Reilly, 116 U. S., 80, 96), hence the statutes herein cited are properly before this court, as they were judicially noticed also in the lower courts.

After deciding the statutory questions raised by appellant, the Circuit Court of Appeals had authority to certify the constitutional questions also involved, as is indicated by the cases cited by it in its certificate. Two of the decisions of that court cited have since been decided on the merits in this court (U. S. vs. Lee Yen Tai, 185 U. S., 213; affg. 113 F. R., 465; Sun Pub. Asso. vs. Edwards, 194 U. S., 377, affg. 121 F. R., 826). See particularly U. S. vs. Lee Yen Tai, 113 F. R., 465; Carter vs. Roberts, 177 U. S., 496 at 500; Amer. Sugar Co. vs. New Orleans, 181 U. S., 277; also Spreckels Sugar Refining Co. vs. McClaim, 192 U. S., 397.

POINT I.

The Constitution providing for the delivery up only of persons "charged with treason, felony or other crime, * * * to be removed to the state having jurisdiction of the crime" it is herein urged that this means that the charge must be pending in a court that can try defendant, and not merely before a committing magistrate who can only discharge or hold for another tribunal.

In the leading case of Kentucky vs Dennison, 24 Howard, 66, Chief Justice TANEY, as the spokesman of this court, said, concerning this provision:

> "The Governor of the state could not, upon a charge made before him, demand the fugitive, for, according to the principles upon which all of our institutions are founded, the executive department can act only in subordination to the judicial department, where rights of person or property are concerned, and its duty in these cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judicial department *The executive authority* of the state, therefore, *was not authorized by this article to make the demand* unless the party *was charged in the regular course of judicial proceedings.* And it was equally necessary that the executive authority of the state upon which the demand was made, when called on to render his aid, should be satisfied by competent proof that the party was so charged. This pro-

ceeding, when duly authenticated, is his authority for arresting the offender."

As an indictment constituted the basis of the demand in the case then before this court, it was not called upon to determine whether a complaint in mere preliminary proceedings constituted a "charge in the regular course of judicial proceedings."

Hon. W. W. Thornton, a well-known legal writer having special familiarity with interstate rendition through his official relations, as Deputy Attorney General, to the Governor of Indiana in such cases, says in an able article contributed by him in 1882, entitled "Fugitives from Justice—Some Points of Practice" to the Criminal Law Magazine, Vol. III, page 787 at 792:

> "*The rendition of fugitives from justice is frequently sought upon an affidavit filed before a committing magistrate.* It is not the object of such a proceeding to try and convict the criminal in that court, but simply to bind him over for trial in a higher court. It is the experience of almost every governor to meet with such demands. *We have but little hesitancy in saying that such a demand should be refused. It is not a 'charge in the regular course of judicial proceedings,' within the meaning of the constitutional provision. The constitution contemplates a charge in a court where there can be a trial and conviction and not simply a decision whether the accused shall give bond for his appearance in another court to answer a charge that may or may not be preferred against him.*"

This language precisely accords with the holding of this court as to the nature of preliminary proceedings, made under another statute (Rev. St. 643), the one governing removal to the federal

courts of prosecutions against persons claiming to have acted under federal authority, reported as

Virginia vs. Paul, 148 U. S., 107 at 119,

where Mr. Justice GRAY delivered the opinion of this Court, saying:

> "*Proceedings before a magistrate to commit a person to jail*, or to hold him, in order to secure his appearance to answer for a crime or offense, *which the magistrate has no jurisdiction himself to try*, before the court in which he may be prosecuted and tried, *are but preliminary to the prosecution, and are no more a commencement of the prosecution than is an arrest by an officer without a warrant for a felony committed in his presence.*"

The court proceeded to concede that contrary views had prevailed in the Circuit Courts under this provision (Sec. 643), but disregarded the numerical weight of authority, in order to approve instead of the language of Mr. Justice GRIER in

Commw. of Pa. vs. Artman, 5 Phil., 304; 19 Fed. Cases, 10, 952:

> "The prosecution has not been commenced in the state court. A warrant has been issued by a justice of the peace, and the defendants have been arrested preparatory to the commencement of a prosecution in the state court but the attorney for the commonwealth has not sent a bill to the grand jury. We do not know therefore, whether the commonwealth of Pennsylvania intends to prosecute the defendants for the alleged offense, or *whether the grand jury will find a bill*, without which the prosecution cannot be said to be commenced in the state court."

Virginia vs. Felts, 133 F. R., 85, 87, accordingly.

Of course if the cause be triable before the justice of the peace, and he is not sitting merely as a committing magistrate, a different rule obtains Virginia vs. Bingham, 88 F. R., 561, distinguishing Virginia vs. Paul, *supra*.

It is of course true that these cases arose under a different statute, as is pointed out by the Circuit Court of Appeals below (Matter of Strauss, 126 Fed. Rep., 327, 330), and also that another independent line of argument may have also in part led to the holding in these cases, but it is submitted that the nature of these preliminary proceedings is accurately stated in them, and that they apply here also.

Historically, it is certainly true that these preliminary proceedings were merely a melioration of the practice of arresting without warrants for crime, to secure presence on indictment to be found, as is so tersely stated by Mr. Justice Gray, *supra*.

> Stephens' History of the Criminal Law, 1, 190-2.
>
> Kinghorn on "The Preliminary Investigation of Crime," in Crim. Law Mag., Vol. III, p. 297.
>
> Encycl. of Pleadings & Practice, Vol. XVI, p. 820, "Preliminary Examination."

An examination of Blackstone's Commentaries, with which the framers of our Constitution were so familiar, clearly shows that the pendency of these preliminary proceedings was not regarded at the time of the adoption of the Constitution as a "charge in the regular course of judicial proceedings." Book IV, Chap. 23, entitled "Of the Several Modes of Prosecution," enumerates the only

methods he speaks of as "the manner of their (offender's) formal accusation," and, of course, does not include preliminary proceedings In Book IV, Chap. 22, preliminary proceedings are under consideration, and he concisely says that the commitment in which they culminate in default of bail "is only for safe custody" (p. 300 of Tucker's Edition, Vol. 5).

He adds, concerning detention after commitment (*Id.*):

> "But this imprisonment, as has been said, is only for safe custody, and not for punishment; therefore in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with fetters, or subjected to other hardships than such as are absolutely requisite, for the purposes of confinement only; though what are so requisite must too often be left to the discretion of the jailers who are frequently a merciless race of men, and by being conversant in scenes of misery, steeled against any tender sensation."

The English common law practice authorized removal only after indictment found, as is pointed out by Judge Brown, in his historical review of preliminary proceedings, in

In re Dana, 68 F. R., 886 at 893; where he said:

> "By the common law practice and by the state practice, the defendant, *if within the state or kingdom, was arrested upon a bench warrant, or a warrant signed by a justice of the peace, issued directly upon the finding of the grand jury. The bench warrant ran throughout the state or kingdom;* a justice's warrant had to be "backed or endorsed, by a justice in the *county where the defendant was found.* 1 Chitty Cr. Law, 342, Code Crim. Proc. N. Y., Section 304."

It will furthermore be remembered that oppressive removals to the mother country for trial for alleged crime, was one of the grievances specifically set forth in the Declaration of Independence:

> "For transporting us beyond seas to be tried for pretended offences."

See

Friedenwald: The Declaration of Independence (1904), pp. 249-250;

Winsor: Narrative and Critical History of America, Vol. VI, p. 53;

Bancroft: History of the U. S. (1857 Ed.), Vol. VI, 417-418, 441, 450-1.

and it seems quite unreasonable to suppose that the colonists intended to open the door to such oppressive removals as would be involved in rendition on mere complaints to distant states, to answer indictments that might never be found. Chancellor Walworth in Jack vs. Martin, 14 Wendell, 507 at 525, said:

> "But I must still be permitted to doubt whether the patriots of the revolution, who framed the Constitution of the United States and who had incorporated into the Declaration of Independence, as one of the justifiable causes of separation from our mother country, that the inhabitants of the colonies had been transported beyond seas for trial, could ever have intended to sanction such a principle as to one who was merely claimed as a fugitive from servitude in another State."

While it is true, as pointed out by the Circuit Court of Appeals below, that the precise question as to the sufficiency of such complaints as the basis of interstate rendition was never directly consid-

ered, pro or con, in any reported case, it is submitted that the aforementioned authorities and others, to be presently considered, sustain appellant's contention. In fact, no case has been decided by this Court, in which the sufficiency of a mere complaint for such purposes has been sustained, and few reported cases have arisen in any Court in which rendition was sought on a mere complaint.

Almost immediately after the adoption of the Constitution, a controversy arose between the States of Virginia and Pennsylvania which shows how jealously the rights of the individual were viewed. The incident led to the passage in 1793 of the Act of Congress now found as Rev. St., Section 5278, President Washington having transmitted the correspondence in the case to Congress, together with an opinion on the subject by Attorney General Edmund Randolph; the entire message is printed in full in the *American State Papers* (folio, edited by Lowrie & Franklin, 1834), Vol. 20, p. 41, and the relations of this correspondence to the statute were referred to by this Court in Kentucky vs. Dennison, 24 Howard, 66, at pp. 104-5. An indictment was there involved as the basis of the demand, but other objections to rendition were urged, and the whole question was fully considered. The Governor of Virginia, Beverly Randolph, in his message, said as to the constitutional provision:

> "A *charge*, in the sense here used, must be *such an accusation as of itself furnishes a sufficient evidence of guilt to put the accused upon his trial, or to justify his immediate punishment*. It cannot be an accusation founded upon a mere suspicion; it must be founded on some judicial act."

Edmund Randolph, as Attorney General of the

United States, said on this same occasion (*Id.*, p. 41):

> "*He must be charged. This term is sufficiently technical* to exclude any wanton or unauthorized accusation from becoming the basis of the demand. *It would, in the language of mere legal entries, be applicable where a bill had been found by a grand jury.* It must be interpreted under the Constitution, as at least requiring some sanction to be given to the suspicion of guilt by a previous investigation. In the present instance, a grand jury convened before two of the justices of the Supreme Court of Pennsylvania have made it and thus have *furnished a ground for bringing the foregoing persons* to a *formal trial.* Should such a procedure as this be declared to be incompetent as a charge, the object of this article in the Constitution must be either defeated or be truly oppressive."

It will be observed that Mr. Randolph here points out that the word "charged" is used in its technical sense, and also refers to the "formal trial," distinguishable from "preliminary proceedings."

POINT II.

Gross hardship, entirely unnecessary, would result from permitting rendition on mere complaint before a committing magistrate.

Obviously the purpose of the removal, possibly thousands of miles, is not merely for the purpose of having a hearing to determine whether probable cause exists to bind defendant to await the action of another tribunal. The phrase of the constitu-

tional provision "State having *jurisdiction* of the crime" clearly negatives this, and shows that the rendition is for purposes of final trial only. But, as is pointed out in the authorities already cited, an indictment may possibly not be found at all. Meanwhile, however, on appellee's contention, defendant must be delivered up and physically removed, possibly thousands of miles, without any right to bail, when ultimately no "charge" which he must answer will be preferred against him.

It is too clear for argument that the constitutional provision requires actual physical surrender and removal, and that bail is not authorized after an unreviewed warrant of extradition has been issued. Such are the authorities as to bail in interstate rendition at this stage:

Ex p. Erwin, 7 Texas App., 288.
Matter of Foye, 21 Washington, 250.

Of course, bail is authorized while proceedings superseding or delaying surrender are actually pending in the remanding State:

N. Y. Code of Crim. Procedure, Section 831 (the Field Code, adopted in so many States).
State vs. Hufford, 23 Iowa, 579.
Roberts vs. Reilly, 116 U. S., 80, 90, constantly followed in the Federal Courts.
Compare Hawley on International Extradition, p. 59.
Wright vs. Henkel, 190 U. S., 40.
In re Ah Tai 125 F. R., 795.

The English common law made most ample provision for bailing in the County of arrest, even

where an indictment was found in another County.

Rex vs. Bomaster, 1 Wm. Bl., 233.
Rex vs. Jones, 1 B. & Ald., 209.
Rex vs. Braithwait, 2 Lewin C. C., 55.
Rex vs. Brooker, 22 Dowl. Rep., 446.

Surely, where such gross oppression must result, removal on mere complaint before a committing magistrate was not designed by the framers of the constitution.

This is in singular contrast to the methods of federal removal for crime against the United States, established almost coincidently with the framing of the Constitution by the Judiciary Act of 1790 (now Rev. St., 1014). This provides not merely an examination upon the complaint to ascertain the existence of probable cause at the place of arrest, and authority to give bail there, to answer any indictment that may be found in the other district, but under approved practice authorizes the District Judge to exact a copy of an indictment found, before directing removal, so that removal shall not take place while it is in doubt whether an indictment will be found. This practice, in vogue in New York City, is referred to and sanctioned by the Circuit Court of Appeals in

Price vs. McCarthy, 89 F. R., 84, 88:

> "In exercising the authority conferred by statute, *the officers named have wisely insisted generally that it should be made to appear* that criminal proceedings in some form have been instituted against the offender, within the district where the offence is triable, and *usually that an indictment has been found against him;* but Chief Justice MARSHALL in Virginia com-

> mitted Aaron Burr for trial in Ohio, after a hearing before him as committing magistrate, for an offence committed in another district, although no proceedings had been instituted in Ohio."

(There were no hardships as to removal there, bail being furnished.)

This practice of requiring an indictment before ordering removal was specifically approved by Congress with respect to violation of the Bankruptcy Law in Section 10 of that Act.

In either event, there is no such serious hardship there, for bail is commonly given and always allowed except for capital offences in federal removal.

Rendition on mere complaints for indictable offences is unnecessary, and answers no useful purpose, but, on the contrary, creates gross hardship and oppression. Compare Sir Wm. Blackstone's humane language, quoted, *supra* (p. 12). It also runs counter to the principle laid down in

Beavers vs. Henkel, 194 U. S., 73 at 83,

by Mr. Justice BREWER in delivering the opinion of the Court:

> "It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. We must never forget that in all controversies, civil or criminal, between the government and an individual, the latter is entitled to reasonable protection."

In People *ex rel.* Lawrence vs. Brady, 56 N. Y., 186, Judge ANDREWS, speaking for the Court, after pointing out under the very constitutional provision here involved, that

> "The question of his (defendant's) guilt or

> innocence is wholly irrelevant in determining the action of the executive of the State upon which the demand is made. That question is to be investigated and determined by the Courts of the State where the alleged crime was committed,"

added, in a case where rendition was sought on a mere affidavit, the point not being made that preliminary proceedings will not authorize removal, and it not appearing whether final trial was or was not there authorized on this affidavit:

> "It cannot be held that any less degree of certainty is admissible in an affidavit charging the conspiracy than is required in an indictment for the same offence. If any distinction exists in this respect, the affidavit should be the more full and specific. It is usually the *ex parte* statement of the accuser. An indictment is found by a body standing indifferent between the parties, and charged upon oath to inquire of offenses and which is supposed to act upon competent proof in finding the bill."

Wm. H. Seward, while Governor of New York, also emphasized the hardships attending rendition on mere affidavits (Seward's Works, Vol. II, p. 528; note, also, Mr. Thornton's experiences quoted *supra*, p. 9). See, also, 6 Pa. Law Journal, 413 (1847), where the following language is used:

> "Though the Act of Congress, as has been already seen, gives the election of supporting the requisition either by affidavit or indictment, yet there has been a growing jealousy of the former course, and an increased disposition to regard the latter as not only the safer but the most certain method of accomplishing the object. The records of the several States are full of instances where warrants have been refused in consequence of the informality of the

> accompanying affidavits; and whenever flaws can be picked in the stating of the offence, when thus set forth, both Courts and governors have not hesitated to consider them as substantive and fatal defects."

Interstate rendition thus differs from federal removal, not merely in requiring physical removing in lieu of bailing, but also in requiring the same without any ascertainment of probable cause, if removal on a mere affidavit before an examining magistrate be authorized.

Some recent observations of Judge CULLEN, in the opinion of the Court of Appeals in

> People *ex rel.* Corkran vs. Hyatt, 172 N. Y., 176, 182, 187,

are also very much in point:

> "The condition of a citizen of one State surrendered to another for criminal prosecution has not the safeguards which exist in international extradition, for the surrendering State is without any standing to intervene in his behalf, however much its process may be abused. * * *
>
> There is great danger that citizens may be carried into other States to be punished for acts, which are not criminal in the jurisdiction in which they were committed. The case of false pretenses is a notable example. By our Penal Code (Sec. 544), it is provided that a purchase of property by means of a false pretense is not criminal, where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged. *This was doubtless dictated by the knowledge that criminal charges of false pretenses are often instituted in reality to compel the payment of debt, and are easily fabricated.* * * * The real evil of the day is not the insufficiency of the

criminal laws, but the excessive multiplication of statutory crimes."

POINT III.

All our States provide methods of arrest and detention of fugitives from justice before the Governor's warrant of extradition issues.

The suggestion of the Court below, that

> "Congress recognized the fact that exigencies frequently arise where it is impossible to procure an indictment in time to prevent the escape of the offender, and hence provided the alternative method of procedure"

will be considered further *post* in connection with a discussion of Rev. St. 5278, designed to show that the alternative phrase "*affidavit charging crime*" was designed merely to embrace "informations" and such other formal charges of crime as are authorized in the States as the basis of the actual *trial*.

The argument that rendition based on affidavits may be necessary to prevent escapes in the jurisdiction of remand, pending the finding of an indictment, ignores the fact that every State of the Union has provided a system of ancillary proceedings against fugitives from justice for their commitment or bailing until the Governor's warrant issues. This ancillary system meets these needs, and is referred to in this very opinion below (at p. 331) with reference to Sections 829 and 830 of the N. Y. Criminal Code covering this very ground, which the Court below describes as

> "a wise provision to prevent the escape of crim-

inals pending the arrival of extradition papers from distant States."

This provision is met with in all the States that have adopted the Field Criminal Code, as also in others, where it was independently enacted. Moreover, successive preliminary examinations may be had, if necessary. Even before special statutes were enacted on this subject, such preliminary arrest was sustained (Am. & Eng. Ency. of Law (2nd Ed.), Vol. XII, pp. 600, 607). It involves no gross hardship, however, as it does not take defendant out of his State before indictment found, affords opportunity for a hearing as to probable cause, and permits of bailing in the interim, until the Governor's warrant of extradition issues, after indictment.

Among the numerous authorities that have sustained such ancillary state statutes before the Governor's requisition is obtained, fully collected in the above cited article in the Am. & Eng. Ency. of Law, are:

Ex p. State, 73 Ala., 503, 508.
Robinson vs. Flanders, 29 Ind., 10, 14, 15.
Comm. vs. Tracy, 5 Metc., 536, 546, 551 (Chief Justice SHAW).
Ex p. Ammons, 34 Ohio St., 518.
Ex p. Cubreth, 49 Col., 436.
Ex p. Rosenblatt, 51 Cal., 285.
Kurtz vs. State, 22 Fla., 36, 41.
Ex p. White, 49 Cal., 433.

See also

Holmes vs. Jennison, 14 Peters, 540, 547 (Mr. Justice CATRON).
Matter of Strauss, 126 F. R., 327-331 (C. C. A.).

Moore vs. Peo., 14 Howard, 13, limiting *dicta* of Prigg vs. Comm., 16 Peters, 539.

See also the numerous authorities sustaining arrest and detention of fugitives from justice, until the Governor's warrant issues, even without statute, collected in Am. & Eng. Ency. of Law (2nd Ed.), XII, p. 607.

There is no public interest that requires going beyond this procedure and requiring actual removal before the ultimate "charge" has been filed.

POINT IV.

The words "charged with treason, felony or other crime" were, it is submitted, used by the framers of the Constitution in the same sense as that in which analogous words are elsewhere used in the same instrument concerning criminal proceedings, and are inapplicable to preliminary examinations.

Article III, Sec. 2, Subd. 3, providing that

> "The trial of all crimes, except in Cases of Impeachment shall be by jury; and such trial shall be held in the State where the said Crimes shall have been committed, etc."

obviously does not apply to preliminary proceedings, and shows that such were not in contemplation in connection with "charges" of crime.

Obviously the Fifth Amendment does not, either, which provides that,

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury; etc."

On the contrary, reading Article IV, Sec. 2, Subd. 2 in connection with this Amendment, and giving proper force to the latter as a later amendatory limitation on *federal* action, *it is difficult to see why this Amendment does not prevent removal on mere preliminary accusation for infamous offences.* Interstate rendition contemplates federal action (*Ex. p.* Siebold, 100 U. S., 371, 391).

The further provision of the same Amendment

> "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"

has also, of course, been held to be inapplicable to preliminary proceedings.

So also the Sixth Amendment.

See

Ex p. Milligan, 4 Wall., 2.
Ex p. Wilson, 114 U. S., 417.
Ex p. Bain, 121 U. S., 1.
In re Dana, 7 Benedict, 1.

As said by Mr. Justice MILLER in *Ex p.* Bain, *supra*, in delivering the opinion of this Court (p. 12):

> "It remains true that the grand jury is as valuable as ever in securing, in the language of Chief Justice SHAW (in the case of Jones vs.

> Robbins, 8 Gray, 329), 'individual citizens from an open and public accusation of crime and from the trouble, expense and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury; and, in case of high offenses, it is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions.'"

In short, it seems apparent that in none of the provisions concerning charges of crime, did the framers of the Constitution have in mind, preliminary proceedings, which are merely modifications of the ancient methods of arrest and detention without warrant on alleged commission of crime, till indictments or informations can be filed, and that these were not the "charges" of crime for which rendition was contemplated to the "State having jurisdiction of the crime."

It is, of course, well settled that there need be no jury trial in preliminary proceedings; that they are not the basis of the plea of *res adjudicata*, but that successive proceedings on the same claim are authorized, and that they are required to be held in the district of arrest, and not in the place where the crime is claimed to have been committed, and that they do not constitute a "trial."

> Encyclopedia of Pleading & Practice, Vol. 16, p. 821.
>
> Price vs. McCarthy, 89 F. R., 84, 86 (CCA).
>
> *In re* Dana, 68 F. R., 886.
>
> U. S. vs. Lumsden, 1 Bond (U. S.), 15, 26 Fed. Cases, 15641.
>
> Gruch vs. People, 3 Parker's (N. Y.), Crim. Rep., 114.

In Bishop's New Crim. Procedure, Vol. I, Sec. 239a, it is well said:

> "The preliminary examination is not necessary, being a mere expedient to prevent the suspected persons from escaping, or for preserving the evidence, or keeping the witnesses within control."

Matter of Garst, 10 Nebraska, 78.
Lattimer vs. State, 35 Nebr., 609.
Hamilton vs. People, 29 Mich., 173.
Cox vs. Coleridge, 29 Mich., 143.
Ex p. Porter, 16 Texas Appeals, 321.
State vs. Britton, 18 Vroom (N. J.), 251.

In Hamilton vs. People *supra*, CAMPBELL, J., on behalf of a bench which included Judge COOLEY, concurring, said:

> "The Justice in these examinations, does not act judicially in the technical sense, but in his capacity of a conservator of the peace."

In State of Missouri vs. Powell, 44 Mo. App., 21, 24, the Court said:

> "When the complaint was filed by Haseltine, the Justice had authority to issue a warrant for Powell's arrest but he could not be placed on trial, neither could it be said that there was a prosecution against him until there was an information filed by the proper officers."

(2) Preliminary proceedings not being essential to a prosecution for crime, it is submitted that they do not constitute such charge of crime "in the regular course of judicial proceedings," as this Court, speaking by Chief Justice TANEY, in Kentucky vs. Dennison, said must underlie the demand under this very article of the Constitution.

This Court, has of course, repeatedly considered the character of preliminary criminal examinations. In Benson vs. McMahon, 127 U. S., 457, by BLATCHFORD, J., it said:

> "We are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial, by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of these preliminary examinations, which take place every day in this country, before an examining or committing magistrate, for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment or other proceeding, in which he shall be finally tried upon the charge made against him."

In Thiede vs. Utah, 159 U. S., 510, 513, this Court speaking through Mr. Justice BREWER, said:

> "A preliminary examination is not indispensable to the finding of an indictment or the trial thereon, and if the examination itself is not indispensable, it would seem to follow that no step taken in the course or as a part of it can be."

In U. S. vs. King, 147 U. S., 672, 685, Mr. Justice BROWN, speaking for this Court, said:

> "The record proper begins with the indictment or information and ends with the sentence and commitment. The proceedings before a commissioner are principally for the information of the District Attorney."

(3) In Virginia vs. Paul, 148 U. S., 107, *supra*, as already pointed out, this Court held that criminal proceedings do not begin when preliminary

proceedings are instituted. That the Court was considering their general nature and character and not merely construing the particular federal statute *there involved* is apparent from Mr. Justice BREWER's statement (p. 119), that the only exception recognized by the authorities, deals with the question whether their institution bars the running of the Statute of Limitations. As to that question, it must be conceded that the authorities are conflicting, though the weight of authority is to the effect that they do not, especially not under the federal statute.

Commw. vs. Haas, 57 Pa. St., 443.
In re Griffith, 35 Kans., 377.
City of Pilot Grove vs. McCormick, 56 Mo. App., 530.
Boughn vs. State, 44 Neb., 889.

Under the federal statute:

U. S. vs. Vondersmith, quoted in Wharton's Am. Cr. Law, 6th Ed., Sec. 436, note.
Ex p. Lacy, 6 Oklahoma, 4.
Instructions of U. S. Attorney General in 1894, cited in Pierson's Precedents applicable to Administration of the Pension and Bounty Land Laws (Gov. Printing Office, 1895).

In fact the federal statute (Rev. St., Sec. 1044), p. 19, originally enacted as part of the Judiciary Act of 1790 (1 Stat., at L. 119), which provided

> "Nor shall any person be prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture under any penal stat-

> ute, *unless the indictment or information* for the same shall be found or instituted within two years from the time of committing the offence," etc.

is itself strong contemporary evidence that the framers of the constitution did not regard a criminal charge as pending, merely because preliminary proceedings before a committing magistrate, as distinguished from indictment or information, had been instituted.

(4) It is further submitted that the word "charge" in Article IV, Sec. 2, subd. 2, where it is connected with the phrase "to be removed to the State *having jurisdiction of the crime*," is used in the same sense in which the framers of the Constitution, in Article III defined "cases" within the "judicial power of the power of the United States" to be "vested in one Supreme Court and in such inferior Courts as the Congress may from time to time establish," and that the former should be construed in the same manner in which the latter have been defined, as *excluding mere preliminary examinations before mere committing magistrates acting as conservators of the peace.*

> Robertson vs. Baldwin, 165 U. S., 275, 278-280.
> Todd vs. U. S., 158 U. S., 278.

POINT V.

Revised Statutes 5278 as construed, and the cases under it considered.

As already pointed out, the controversy between Virginia and Pennsylvania of 1791 led to the passage of the Act of Congress of Feb. 12th, 1793 (1

Stat., at L. 302), now Rev. St., 5278. The principal purpose of the statute was to remove the argument that the constitutional provision was not self-executing, but required legislation. As pointed out by Chief Justice TANEY, in Kentucky vs. Dennison, the practice in vogue under the Articles of Confederation was continued, of looking to the executive official of the State of refuge, to direct the delivery of the fugitive, though in as far as this very federal act threw a mandatory obligation upon a State official, not exacted in the Constitution itself, it is unconstitutional (Prigg vs. Commonwealth, 16 Peters, 539, at 616, 620, Kentucky vs. Dennison, *supra*, *Ex p.* Seebold, 100 U. S., 371, 391; compare Robertson vs. Baldwin, 165 U. S., 275, 278, 280). The theory that delivery up was authorized only through executive action in the State where the fugitive was found, has been ascertained, as regards our colonial period, to be historically inaccurate (Moore on Extradition, Vol. II, Sec. 517-519).

Upon proceeding to legislate on this subject, Congress was confronted by the fact that many minor offences were at this very time triable both in England and in the States without indictment, and the provision of the Judiciary Act of 1790 as to limitations already cited, in terms recognized procedure by "information" in appropriate cases.

Ex p. Wilson, 114 U. S., 417.
Mackin vs. U. S., 117 U. S., 348.
Callan vs. Wilson, 127 U. S., 540.
Hurtado vs. California, 110 U. S., 516.
Blackstone's Commentaries, Book II, Ch. 23.
Quincy's Mass. Colonial Reports, 178 (1765).

The only limitation upon informations, in cases not triable by indictment, was that they must be upon oath of persons having actual knowledge, and that a mere statement of charge upon the oath of office of a prosecuting officer does not suffice, but must be accompanied by *affidavits* from persons having actual knowledge.

U. S. vs. Tureaud, 20 F. R., 621.
Ex p. Lane, 6 F. R., 34, 38.
In re Dana, 68 F. R., 886, 894-5.
U. S. vs. Polite, 35 F. R., 58.
Johnston vs. U. S., 87 F. R., 187 (C. C. A.).
Compare Rice vs. Ames, 180 U. S., 371, 374-5.
Beavers vs. Henkel, 194 U. S., 73, 87.

In United States vs. Tureaud, *supra*, we find a valuable historical review of the law as to "Informations," followed and applied in the later cases, particularly by the Circuit Court of Appeals in the Johnston case. An "information" was there challenged, because based only on an affidavit of *belief* as to its truth. Judge BILLINGS says:

> "The point, and the sole point, to be passed upon is whether this affidavit furnishes such a 'probable cause,' and is supported by such an oath, as is required by the fourth amendment to the constitution. It is true, it is an affidavit subjoined to and made the basis of an information. It is also true that under the usages of the government of Great Britain this information belongs to the class of formal accusations which could be made by the King in his courts without any evidence and against all evidence. But the adoption of the fourth amendment affected all kinds and modes of prosecution for crimes or offenses, for there can be no legal pursuit of accused persons without

> apprehension. * * * All arbitrary informations, all informations which spring into existence simply because the King and his attorney elected to present them, indeed *all informations, except those supported by proof upon oath, which constitute probable cause, by this constitutional provision were expunged from permissible procedure.*"

In support of his conclusion that the supporting affidavit must contain facts within the personal knowledge of affiants, Judge BILLINGS quoted the language of this Court in *Ex p.* Burford, 3 Cranch, 453:

> "The judges of that Court were unanimously of opinion that the warrant of commitment was illegal for want of stating some *good cause certain, supported by affidavit.*"

and also Mr. Justice BRADLEY's language (3 Woods, 502):

> "In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit or taken down by himself on a personal examination exhibiting the facts on which the charge is based, and on which the belief or suspicion of guilt is founded."

In providing for rendition for crimes, ultimately triable otherwise than by indictment, Congress looked to the substance of the "information," the the affidavit of charge, and not merely the formal information, therefore, in enacting what is now Rev. St. 5278.

Varying names were and might in the future be expected to be given by the different States, to these authorized substitutes in certain cases for "in-

dictments," the name by which the formal charges on which the actual trial took place, known to the common law, having been "informations," and frequently the same varying names were also applied to the accusations on which mere preliminary examinations took place.

As said in the Ency. of Pleading and Practice, Vol. X, page 353:

> "Informations or complaints, or affidavits in the nature of informations or complaints, are used in criminal procedure before justices of the peace and other inferior Courts exercising like jurisdiction, both where the justice of the peace acts as a conservator of the peace in the examination and commitment of persons charged with crime, and where he, or such Court as exercises the same jurisdiction, acts upon the affidavit, information or complaint in the trial and punishment of the persons charged."

It was certainly not the purpose of Constitutional Convention or Congress, which had expressly provided for rendition for all crimes, no matter how petty (Kentucky vs. Dennison, *supra*), to require the States to change, their criminal procedure by resorting to indictment exclusively, even for non-indictable offenses, in order to secure rendition (*Ex p.* Reggel, 114 U. S., 642; Beavers vs. Henkel, 194 U. S., 73, 84), and to prohibit surrender on "informations" properly charging non-indictable crimes, and hence Congress was, of course, called upon to provide for surrender on "informations," by whatever name known, and not merely on "indictments."

This Congress did in the Act of 1793, now Rev.

St. 5278, providing that the demand shall be accompanied by a

> "copy of an *indictment* found, or an *affidavit* made before a magistrate of any State or Territory, as aforesaid, *charging* the person so demanded with having committed treason, felony or other crime."

The affidavit referred to must be an affidavit "*charging*" crime. Congress took care here to repeat the constitutional word, which has been construed by both Attorney General Edm. Randolph and the Attorney General of Virginia, as being employed in a "technical" sense, as requiring a charge "in the regular course of *judicial* proceedings." It was furthermore mindful of the constitutional limitation placed upon any warrant that might be issued under its mandate (4th Amendment),

> "no warrants shall issue, but upon probable cause, supported by oath or affirmation."

The statute therefore clearly expresses the legislative intent that a substantial "information" of charge, however, it might be styled, and not resting merely on aborrent oaths of office, but on the "oath" by affidavit required by the Constitution, should alone justify rendition in appropriate cases, and the Act of Congress does not indicate any intention to authorize removal on mere affidavits filed as the basis for preliminary examination.

The words "indictment" and "affidavit" charging crime, are used distributively, just as they are used in the similar provisions of the Judiciary Act of 1790, as to Statutes of Limitations for crimes, as held by this Court

Mackin vs. U. S., *supra*.

and were not designed to authorize the substitution of an "affidavit" charge, for offences triable by the State Law only on indictment. As said by this Court in

Mackin vs. United States, *supra*, as to such grouping of the words "indictment or information":

> "(It) does not undertake to define which of these crimes and offences are infamous, and, therefore, not to be prosecuted by information, but leaves that to be regulated by the paramount authority of the Constitution. * * * *The including, in a single clause, of two classes of offences, one of which may be prosecuted by information, is a sufficient reason for mentioning informations as well as indictments, without attributing to Congress an intention that both classes should be prosecuted by information*" (117 U. S., 348, 353, 354).

The decision of Mr. Justice BLATCHFORD in

In re Dana, 7 Benedict, 1,

approved of and followed by this Court in

Callan vs. Wilson, 127 U. S., 540,

is direct authority for the proposition that removal should not be authorized, where the pending proceeding does not provide for jury trial in cases where that is a right, even though (in that case, but not here, on a charge of felony), trial *de novo* after conviction, before a jury in another Court be provided for, and the circumstances that federal removal as distinguished from interstate rendition was there involved, is immaterial.

The Circuit Court of Appeals below (126 F. R., 327), not only felt bound, in view of the limitations

upon its jurisdiction, to ignore the constitutional argument entirely, but entirely overlooks the fact that all crimes are not finally triable by "indictment," but that "informations" ("affidavits of charge in a Trial Court"), have been authorized for the trial of offences not infamous for centuries past, and that scope and effect may be given to these words in the statute without making them equivalent to "complaints in preliminary hearings," and without construing the statute as prescribing a "mere alternative method of procedure," a position condemned by this Court in the Mackin case.

The Court below refers to the language used by this Court in

Ex p. Reggel, 114 U. S., 643,

in which it points out that an indictment only was involved, but overlooks the fact that this Court does not, in paraphrasing the statute, refer to an affidavit in preliminary proceedings, but that this Court's language is fully satisfied by a reference to "affidavits" of formal charge in a Trial Court.

It will, furthermore, be noticed that neither of the two cases cited by the Court below on this point (*In re* White, 55 F. R., 55, Kingsbury case, 106 Mass., 223) involved the precise point here raised, and that neither of the authorities cited by Prof. Moore in his work on Extradition (II Sec. 546), referred to by the Circuit Court of Appeals, sustains his statement in his text.

The fact that the point may not heretofore have been urged, and has, therefore, not been decided pro or con, heretofore, is no valid argument against appellant's contention (*Ex p.* Wilson, *supra*. Boyd

vs. U. S., 116 U. S., 616), but it should, on the other hand, be remembered that mere complaints before committing magistrates have seldom been made the basis of rendition proceedings, and that they have very seldom come before the Courts for consideration, as also that the reported opinions of Courts and State executives show that they are viewed with extreme disfavor, though the point here urged would probably not have been received with much favor before this Court overruled the line of cases considered in Virginia vs. Paul, *supra*, in 1893.

Several propositions concerning Rev. St., 5278, are however established by the decisions, besides those already considered, to the effect that the charges must be made "in the regular course of judicial proceedings."

The affidavit of charge must itself be produced, and an affidavit merely averring that defendant is charged in the other State is not sufficient.

State vs. Kufford, 28 Iowa, 391.
Smith vs. State, 21 Nebraska, 552.
Forbes vs. Hicks, 27 Nebraska, 111, 116.
Ex p. Pfitzer, 28 Ind., 450.
Ex p. Lorraine, 16 Nevada, 63.
Ex p. White, 49 Calif., 435.

Says the Court in *Ex p.* Pfitzer, *supra:*

> "A copy of the affidavit must be produced before the governor of a State is authorized, upon the requisition of the governor of another State, to issue his warrant for the arrest of the fugitive."

In State vs. Hufford, *supra*, it was said:

> "A charge of the crime against the person to be arrested and delivered up must be made in

the State where the offense was committed. *This charge must be made* to some court, magistrate or officer, *in the form of an indictment, information or other accusation, known to the law of the State* in which the offense was committed. We conclude, therefore, that unless the accused in this case was so charged, the magistrate had no jurisdiction. * * * The evidence upon which this case was tried contains no proof that the accused was *charged* with the crime in Illinois, where it is alleged to have been committed. The jurisdiction of the magistrate is neither averred in the complaint or information, nor shown by the evidence; it cannot be presumed. We must regard the proceedings, therefore, as void."

In *Ex p.* Powell, 20 Florida, 807, the Court said:

"It is well known that in every State persons who are not magistrates are empowered to certify the acknowledgment of deeds and to administer oaths, and so it cannot be presumed that because an oath is taken the person certifying it is a judicial officer, and that it is taken in the course of administration of justice in a criminal prosecution. The act of Congress is explicit that the 'charge' must be made before a magistrate and the demand of the fugitive must be made by the executive authority in aid of the judicial authority in administering laws for the punishment of crime. * * * There is here no legal presumption that a criminal prosecution was commenced before a magistrate or court, from the fact that an assertion was made on oath that a crime had been committed. Such affidavits are made in civil suits as all lawyers well know, and before notaries and commissioners for various purposes other than the prosecution of criminals. Extrajudicial affidavits also are often made and sometimes for mischievous purposes."

In State vs. Richardson, 34 Minn., 115, the Court said, holding that a warrant of extradition is void which recites that it is based on a "complaint" and does not use the term "affidavit":

> "An indictment or an information embodies a criminal charge or accusation by a grand jury or by an officer acting under the sanction of an oath pursuant to law; but if the charge is not made in that form, then it must affirmatively appear to have been made by affidavit. Such affidavit must, of course, be in writing and duly certified by the magistrate before whom made. It may be conceded that a complaint is the initial proceeding in criminal prosecutions and examinations before magistrates, and that such complaint is required to be upon oath. Campbell vs. Thompson, 16 Me., 117. It may also, by itself, if the statement of the criminal charge be sufficient, constitute an examination so as to authorize the issuance of a warrant. State vs. Nerbovig, 33 Minn., 470. And if a jurat be attached, and it is properly certified by the magistrate, as is frequently the case, in practice, it will be essentially an affidavit. But a complaint is not necessarily an affidavit, nor are they in legal practice or contemplation understood as convertible terms. For, though a complaint may be reduced to writing and subscribed, it need not necessarily be certified by the magistrate, for the fact may otherwise appear by his records. And so a complaint may be merely formal, and made or entered by one who has but little, if any, knowledge about the facts and the examination consist of the deposition of other witnesses—State vs. Armstrong, 4 Minn., 251—while an affidavit, as the term is ordinarily used in such cases, is understood to be a sworn statement of facts or a deposition in writing, and to include a jurat, which means a certificate of the magistrate showing that it was sworn to before him,

> including the date and sometimes, also, the place."

In *Ex p.* Pearce, 32 Tex. Crim. App., 301, 305, the Court seems to have adopted the construction here contended for in incidentally construing the constitutional provision:

> "*An examination of the Constitution shows that where a person is charged—that is, in due course of legal procedure of the particular State, or to use the language of the statute, where there is an indictment found charging a person*—with having committed a crime, and he is a fugitive from justice, he should be surrendered on demand of the executive of the State from which he fled."

Some vicious unintended results of such overliteral construction as that adopted by the Circuit Court of Appeals below, are brought to light by the class of cases concerning attempted rendition on informations, a most important matter in these days, when informations under constitutional amendments are more and more frequently being substituted for indictments, and the grand jury abolished. High authority is to be found to the effect that this does not suffice, to secure rendition.

Ex p. Hart, 63 Fed. Rep., 249, 259 (CCA).

But see directly to the contrary:

In re Hooper, 52 Wisconsin, 699.

People vs. Stockwell, 97 North Western, 765 (Minn.).

In re Van Scriever, 42 Nebraska, 772, 778-780.

Such tendency towards over-literal construction, which the same Circuit Court of Appeals deprecates

in another recent case (U. S. vs. Dominci, 78 F. R., 334, 337, CCA), moreover leads to the absurd result that rendition would be authorized in preliminary proceedings, where an affidavit of charge is employed, but would not be where the proceeding is pending in the higher Trial Court on *information*.

POINT VI.

In view of the authoritative decisions construing the term "fugitives from justice" as describing all persons in the demanding State at or about the time of the commission of the offense, charged with committing it there, defendants are frequently only "fugitives from justice" by construction, and their removal is sought to States other than that of their domicile.

Roberts vs. Reilly, 116 U. S., 80, 197.
Streep vs. U. S., 160 U. S., 128.

POINT VII

In the light of the foregoing authorities, therefore, it is respectfully submitted that the first question certified should be answered in the negative. As to the second question, it is submitted that it is based upon an incorrect construction of Revised Statutes, Section 5278, making it authorize rendition on a mere complaint before a committing magistrate. (Matter of Strauss, 126 Fed. Rep., 327.) It is submitted that this is an erroneous construction of the statute, and that the statute, correctly construed in the light of the constitutional provision, does not authorize such rendition and is valid, but that, if the contrary be the correct construction of the Act, the same is violative of the Constitution, and in that event the question certified should be answered in the affirmative.

Respectfully submitted,

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Supreme Court

OF THE UNITED STATES,

OCTOBER TERM, 1904.

In the Matter of MORRIS STRAUSS. } No. 186.

SUPPLEMENTAL BRIEF FOR APPELLANT.

I.

Were it not for the fact that the brief for appellee seriously urges the claim (in Point III) that a system of State rendition may be established by State legislation, in cases and under conditions other than those provided for by Federal law, there would be little occasion to file this supplemental brief. A mere inspection of the brief of appellee shows that the alleged inconveniences and absurdities complained of result from a mere ignoring of the State statutes, providing for apprehension and bailing prior to issuance of the Governor's de-

mand, though the validity of these provisions is not challenged by the State. In fact, our argument on this point is considerably strengthened by the District Attorney's reference to Section 827 of the New York Code of Criminal Procedure, which paraphrases and construes the words "indictment found or affidavit made * * * charging the person demanded" in U. S. Rev. St., 5278, by means of the equivalent terms there employed:

> "*indictment or information* from the authorities of such other State or territory."

The suggestion of the learned counsel (footnote, page 32), that the term "information" is used here as defined in Section 145 of the same Code as the pleading before a committing magistrate, is obviously fallacious, for that section refers only to "informations" under the New York Practice, and naturally the foreign States referred to in Section 827 do not take their nomenclature from the New York Criminal Code; the section obviously refers to the common law substitutes for "indictments," authorized in cases not involving infamous crimes, and on a parity with indictments, which would otherwise not be provided for at all.

II.

The learned counsel for appellee herein, in claiming that the State of New York has established an independent and substitute method of rendition of fugitives from justice, is claiming an authority for State legislation which that State has never before asserted, which its lawmaking body has expressly and in terms disclaimed, and which its Courts, together with overwhelming additional ju-

dicial authority, have quite uniformly held to be unconstitutional.

Section 827 of the New York Code of Criminal Procedure, set forth on the brief for appellee (p. 32), is an amendment of the same section of the Act, originally enacted in 1881 (Laws of New York of 1881, Vol. II, Section 827). This is the famous "Field Criminal Code," which was drafted and reported to the State Legislature by Commissioners appointed for that purpose already in 1849. In their report of that year, this section (there numbered Section 897), bears the following suggestive annotation, inserted by the distinguished revisors, David Dudley Field, David Graham and A. Loomis:

> "Declaratory of the duty imposed upon the governor, by Article 4, Section 2, Subdivision 2 of the Constitution of the United States."

A statute merely declaratory of the Federal statute was thus designed by the drafters, not one authorizing surrender and shipment through other states, on grounds or papers insufficient to authorize such course under federal laws.

Nor is it difficult to find the reason for this sort of legislation. This Court had held that it was not competent for Congress to impose a mandatory duty on a State official as such with respect to rendition (Prigg vs. Commonwealth, 16 Peters, 539, 616, 620; Kentucky vs. Dennison, 24 Howard 66; *Ex p.* Seebold, 100 U. S., 371, 391; compare Robertson vs. Baldwin, 165 U. S., 275, 278, 280), and, accordingly it was in order for the law-making bodies of the States to create an obligation, where otherwise there might have been only a right. Moreover, further detailed regulation of the practice to be pursued by the State officials in carrying

out the federal statute, were established, in no way inconsistent with that law, and not aiming at establishing a substitute therefor, and these provisions are properly described as merely "in aid of the Congressional enactments" and to "provide proper and adequate means and facilities per the accomplishment of such extradition" (Spear on Extradition, pp. 309-312, quoting *Ex p.* Ammons, 34 Ohio St., 518).

It is, accordingly not strange, that none of the cases cited by appellee (Brief, pp. 23, 25-27) should have involved actual attempted surrender to another State and removal to another State, independently of the Federal Statute and that the passages quoted all relate to justification of mere arrest and detention or bailing, prior to the issuance of a Governor's warrant under the Federal Statute, and in aid thereof.

A state statute which provides not merely for arrest and detention until the Governor's demand under the federal law, but for independent surrender and transportation of prisoners from one state to another, demanding, state, through the territory of still other states, is condemned by overwhelming authority as unconstitutional, because:

1. The Federal Constitution and Statute established an exclusive method of surrender and transportation, invalidating any state legislation on such point.

2. Because inconsistent with and in contravention of Article 1, Section 10, Subdivision 3, of the Federal Constitution, providing

> "No state shall, without the consent of Congress, * * * enter into any agreement or

compact with another state or with a foreign power."

3. Because no state has jurisdiction to authorize the transportation of any person, involuntarily, into or through territory outside of its own boundaries, and no theory of "police power of a state can authorize such procedure, especially as no exercise of such power is involved in acts not amounting to mere expulsion, with respect to persons merely complained against, and not convicted of crime in a demanding state (People *ex rel.* Barlow vs. Curtis, 50 N. Y., 321, 330-1; People *ex rel.* Lawrence vs. Brady, 56 N. Y., 186).

A long line of authorities holds that a state statute attempting to provide for surrender of fugitives from justice from another state, on terms differing from the federal law, is unconstitutional, some of them (like *Ex p.* McKean, 3 Hughes, 23; 16 Fed. Cases, No. 8848), involving the question directly, and not merely by way of dictum.

It is conceded by opposing counsel (p. 23, note), that a state statute as to delivery up of fugitives from justice to a foreign country would be unconstitutional (U. S. vs. Rauscher, 119 U. S., 407, approving People *ex rel.* vs. Curtis, 50 N. Y., 321), but this overlooks the fact that the same constitutional provision that forbids such agreements with a foreign power, also forbids agreement between states, while in the latter case we have the further argument that there exists a federal grant of power as to interstate rendition, exercised by Congress, which eminent authorities, at least, have regarded as exclusive. The reasoning in People *ex rel* vs. Curtis is most convincing at every point. Among the numerous authorities holding a state

statute construed as contended for by appellees, unconstitutional, are

Holmes vs. Jemnison, 14 Peters, 540, 570-574.

Prigg vs. Comw., 16 Peters, 539, at 617-618, 620, 622-5.

Kentucky vs. Dennison, 24 How., 66, 104.

Roberts vs. Reilly, 116 U. S., 80, 94.

Hyatt vs. Corkran, 188 U. S., 691, affg.,172 N. Y., 176.

Malcolmson vs. Gibbons, 56 Mich., 459.

Commw. vs. Tracy, 5 Metc., 536, 550.

Kurtz vs. State, 22 Florida, 36, 42.

Ex p. McKean, 3 Hughes, 23; 16 Fed. Cases, 8848.

Ex p. Smith, 3 McLean, 121; 22 F. C., 12968.

Matter of Titus, 8 Ben., 411; 23 Fed. Cases, 14062.

Ex. p. Rosenblatt, 51 Cal., 285.

Cases cited in our main brief, page 22.

In Prigg vs. Commw., Judge STORY speaking for this Court, said of this very provision (pp. 617-618):

> "If this be so, then it would seem, upon just principles of construction, that the legislation of Congress, if constitutional, must supersede all state legislation upon the same subject and by necessary implication prohibit it. For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere and, as it were, by way of compliment to the legislation of Congress to prescribe additional regu-

> lations, and what they deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress in what it does prescribe manifestly indicated that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do, is as expressive of what its intention is, as the direct provisions made by it."

See, accordingly,

The Roanoke, 189 U. S., 185, 197-9.

In Kentucky vs. Dennison, Chief Justice TANEY said (at page 104):

> "This duty of providing by law the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon Congress; for if it was left to the States, each State might require different proof to authenticate the judicial proceeding upon which the demand was founded."

In Roberts vs. Reilly, this Court, after quoting this passage, added:

> "It follows, however, that whenever the executive of the State upon whom such a demand has been made by virtue of his warrant, causes the arrest for delivery of a person charged as a fugitive from the justice, of another State, the prisoner is held in custody *only under color of authority derived from the constitution and laws of the United States*, and is entitled to invoke the judgment of the judicial tribunals, whether of the State or the United States, by the writ of *habeas corpus*, upon the lawfulness of his arrest and imprisonment."

The recent case of Hyatt vs. Corkran, holding

that persons who are merely constructively "fugitives from justice" cannot be extradited, in view of the Federal constitutional provision, is, of course, also inconsistent with appellee's claims, in spite of a labored effort to distinguish the case (Note, page 29). The New York Court of Appeals by Judge CULLEN, said in that case (page 181), as to interstate rendition:

> "It is not governed by international law, but depends solely on the provisions of the Constitution of the United States and the act of Congress made from it."

And again at page 182, in summarizing the holding of this Court, in Lascelles vs. Georgia, 148 U. S., 537:

> "It was there held that interstate rendition did not depend on comity or agreement, but on the provisions of the Constitution of the United States."

In Malcolmson vs. Gibbons, 56 Mich., 459, 466, the Court said:

> "The extradition of criminals who are claimed to be fugitives from other States is governed entirely by the Constitution and Laws of the United States. No State can deal with other States, under the express terms of the constitution without the approval of Congress, and what the State cannot do, its policemen cannot do. An arrest here without compliance with the United States laws cannot be maintained. Michigan cannot treat foreign offenses as domestic, and there is nothing in our statutes which contemplates an arrest without warrant, for purposes of extradition."

In Commw. vs. Tracy, 5 Metcalf, 536, 550, Chief Justice SHAW laid down the principle under which State statutes authorizing purely ancillary State aid are sustainable, saying:

> A statute "authorizing magistrates to issue a warrant and cause such person to be held for examination and imprisoned or bailed for a limited time, is a wise law and one which the legislature are competent to make and enforce, independently of their constitutional obligation to surrender such person to other States, for trial and punishment."

Similarly, in Kurtz vs. State, 22 Florida, 36, 42, the Court said:

> "The demand is evidently the initial point at which the constitution and the law begins to operate, and prior to this neither has any application to the case. While legislation by a State against the constitution and the laws of Congress impairing the full operation of their provisions, would be nugatory, yet it is competent, for a State Legislature to enact laws on the subject at a stage prior to that which the constitution and Federal laws have designated as the time at which they take cognizance of it, provided, that such enactments are not inconsistent with the ends named in the constitution."

In *Ex p.* Ammon, 34 Ohio St., 518, the Court held as to these ancillary statutes, that "State legislation in aid of congressional enactments is not objectionable."

Accordingly, it seems clear on authority that State legislation cannot authorize interstate rendition of fugitives from justice in cases not falling within the Federal statute and constitution, and

that, moreover, the State statute does not attempt to do so, and is subject to the same construction as the Federal enactments, in authorizing rendition only when the cause is before a Trial Court proper, though valid provision has properly been made for arrest and detention and bailing under State law, prior to the making of a requisition, at which point the Federal law begins to operate.

Respectfully submitted,

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